

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Brett James Catoe,)	C/A No.: 9:12-3144-JFA-BM
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
Thomas E. Byrnes; and John Pate, Warden)	
of Allendale Correctional Institution,)	
)	
Defendants.)	
)	

The *pro se* plaintiff brings this civil action *in forma pauperis* contending that the defendants committed “medical malpractice” and “negligence” relating to an ear infection he was treated for while incarcerated at the Allendale Correctional Institution. He seeks money damages.

The Magistrate Judge assigned to this action¹ has prepared a Report and Recommendation and opines that the plaintiff should be required to supplement his complaint and advise the court and the defendants of the exact nature of his claim to determine whether the case should be allowed to proceed in this court. The defendants have filed a motion to dismiss contending that the plaintiff failed to exhaust his prison administrative remedies.

¹ The Magistrate Judge’s review is made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. See 28 U.S.C. § 636(b)(1).

The Magistrate Judge recommends denying the defendants' motion to dismiss, without prejudice, to determine if the plaintiff is asserting a medical malpractice/negligence claim or a claim for violation of his constitutional rights under 42 U.S.C. § 1983. As the Magistrate Judge properly notes, medical malpractice and negligence are not federal claims, although such claims could be pursued in state court. The Report sets forth in detail the relevant facts and standards of law on this matter, and the court incorporates such without a recitation.

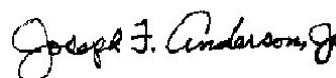
In a one-sentence response to the Report and Recommendation, the plaintiff indicates, "I ask the court to continue in District Court, to my claims against Dr. Byrnes and Warden John pate, as a claim for violation of my constitutional right under 42 U.S.C. § 1983." The defendants object to this cause of action being docketed as one under § 1983 contending that the complaint lacks any mention of a constitutional violation. The defendants further assert that even if the claim is brought under § 1983, it should be dismissed for failure to exhaust administrative remedies.

After carefully reviewing the applicable laws, the record in this case, the Report and Recommendation, and the parties' responses thereto, this court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. The Report is incorporated herein by reference.

Accordingly, the defendants' motion to dismiss is denied without prejudice and this matter shall be returned to the Magistrate Judge for further processing in light of the plaintiff's response to the Report and Recommendation.

IT IS SO ORDERED.

March 26, 2013
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge